IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

ORDER
IN
S.B. Civil Misc. Stay Application No.2983/2002
In
S.B. Civil Second Appeal No.513/2002

Dr. Rajendra Prasad Chorasia S/o Shri Ram Kishan
...defendant-appellant
Versus
Dr. Chandra Devi Sharma S/o Chaturbhuj Sharma
...plaintiff-respondent

Date of Order ::: 28.11.2006

Present
Hon'ble Mr. Justice Narendra Kumar Jain

Shri Rajesh Kapoor, Counsel for appellant
Shri J.K. Singhi, Counsel for respondent
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By the Court:-

Heard learned counsel for the parties on the stay application under Order 41 Rule 5 read with Section 151 of the Code of Civil Procedure.

Learned counsel for the defendant-appellant submits that the appeal has already been admitted, therefore, the interim stay order passed by this court against eviction decree may be confirmed till the final disposal of the second appeal. So far as the award of mesne profit is concerned, the learned counsel for the appellant contended that at present the prevalent market rate of monthly rent of the rented premises is approximately Rs.1000/- (Rupees one thousand), which may be fixed while confirming the interim stay order.

The learned counsel for the respondent contended that both the courts below have recorded a concurrent finding that the rented premises were let out for residential purpose to defendant-tenant but he started running his own clinic in it and has changed the user of it from residential to commercial. He further submits that there are three rooms which were let out in the year 1982 at the rate of Rs.45/- per month, and even after expiry of 24 years the appellant is paying the monthly rent of Rs.45/- only. He further submits that at present the prevalent market rate of monthly rent of the rented premises is approximately Rs.2000/-, therefore, either the interim stay be vacated and the appellant be directed to handover the vacant possession of the property or, in alternative, the mesne profit be fixed at the rate of Rs.2000/- per month, during the pendency of this second appeal.

The Hon'ble Supreme Court in the case of **Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd., (2005) 1 SCC 705**, considered the jurisdiction of the appellate Court while passing order of stay under Order 41 Rule 5 of the C.P.C., and held that the appellate court has jurisdiction to put the applicant under Order 41 Rule 5 of the C.P.C., on such reasonable terms as would, in its opinion, reasonably compensate the decree-holder for loss occasioned by delay in execution of the decree by grant of stay, while passing the stay order in his favour, in the event of the appeal being dismissed. The Hon'ble Apex Court in the above referred case held as under :

> “19. To sum up, our conclusions are:

1. While passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate Court does have jurisdiction to put the applicant on such reasonable terms as would, in its opinion, reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and insofar as those proceedings are concerned. Such terms, needless to say, shall be reasonable.

2. In case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (1) of Section 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree.

> 3. The doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date".

The Hon'ble Supreme Court again in **Anderson Wright & Company Vs. Amar Nath Roy, 2005 DNJ (SC) 562,** while considering its earlier judgment in Atma Ram Properties (P) Limited's case (Supra) reiterated the same proposition of law.

The above referred Atma Ram Properties (P) Limited's case (Supra) has further been followed by three-Judges Bench of the Hon'ble Apex Court in the case of ***Achal Misra Vs. Rama Shanker Singh & Others (2005) 5 SCC 531*** and ***Crompton Greaves Limited Vs. State of Maharashtra (2005) 11 SCC 547***.

This Court in **Madan Bansal Vs. Ramnarayan Sharma, RLR 2006 (1) 733**, considered the similar point and observed as under:

> ".... the criteria for admission of the appeal are altogether different than what adopted at the time of hearing of the appeal for final disposal. Even if the appeal is admitted by the First Appellate Court being a statutory appeal or second appeal as substantial question of law arises then it does not mean that it will be allowed finally. Once

> appeal is admitted, then it is commonly known, that it goes for hearing in Due Course and due to long list of pending old appeals, it takes quite considerable long time in its final disposal. In such circumstances a decree-holder is not only deprived of getting the possession of the rented premises, but also deprived of the monthly rent or the mesne profit or compensation for use and occupation of the rented premises as per the market value of the shop or the prevalent rent of the premises. The order 41 Rule 5 of the CPC gives jurisdiction to the appellate court to pass interim stay staying the execution of the decree but the interim stay order is required to be passed reasonably and while doing so the interest of decree-holder is also required to be protected."

I have considered the submissions of learned counsel for both the parties on confirmation of the ex-parte interim stay order against eviction decree as well as for award of mesne profit in case the interim stay order is confirmed during the pendency of the second appeal. After considering all the facts and circumstances of the present case as well as rival submissions of learned counsel for both the parties, I am of the view that once the second appeal is admitted, the eviction decree should be stayed and accordingly I stay the eviction decree passed against

the defendant-appellant by the courts below, during the pendency of the second appeal on the following terms and conditions:-

> That the defendant-appellant shall deposit the arrears of monthly mesne profit till 31st of October, 2006, as per directions of the courts below, within a period of one month and shall further continue to pay/deposit the monthly mesne profit at the rate of Rs.1250/- (Rupees one-thousand two-hundred & fifty only) per month, with effect from 1st of November, 2006 by 15th day of each succeeding month in the bank account of the plaintiff-respondent, the details of which will be furnished by the plaintiff-respondent within a period of two weeks to the defendant-appellant or his counsel. In case the details of the bank account are not furnished, then the defendant-appellant may deposit the amount, in question, in the lower court itself.

It is made clear that in case all the arrears of mesne profit/rent, as per the direction of both the courts below, are not deposited within a period of one month and the future mesne profit/rent, as directed above, is not deposited with effect from 1.11.2006, for consecutive two months, then it will be open for the plaintiff-respondent to get the decree, passed in his favour by both the courts below, executed even during the pendency of the second appeal.

The stay application accordingly stands disposed of.

(Narendra Kumar Jain) J.

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